Petition

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CAROLYN ATKINS,
Chairman, Missouri Board of Probation and Parole,
JOHN ASHCROFT,
Attorney General of Missouri,
Petitioners,

v.

WILLIAM ELDRIDGE,
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit disregarded the decisions of this Court in *Preiser* v. *Rodriguez* and *Picard* v. *Connor* and the language of 28 U.S.C. § 2254(b) in concluding that respondent had exhausted his available state remedies as to his claim that his trial defense counsel was ineffective for allegedly failing to interview or have interviewed eyewitnesses to the crime.

2. Whether the Eighth Circuit's conclusion that respondent's trial defense counsel did not interview or have interviewed any of the eyewitnesses to the crime is potently invalid and unconstitutional for the reason that it is unsupported by any evidence in the record.

3. Whether the Eighth Circuit could find, consistent with the Eighth and Fourteenth Amendments to the United States Constitution, that respondent's trial defense counsel was ineffective for failing to discover an alleged defense of misidentification concerning which he had no knowledge prior to or during the trial.

4. Whether the respondent's trial defense counsel may be deemed to be constitutionally ineffective because he did not personally interview two potential witnesses when these witnesses were interviewed by defense counsel's investigator and counsel was aware of the results of such interviews.

5. What standard of conduct is to be applied in determining whether the representation of a given attorney falls below that level of effectiveness required by the Sixth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, denying respondent's petition for a writ of habeas corpus, is unreported and appears as Appendix B of the present petition. The Magistrate's reports and recommendations upon which the District Court's order was founded are attached as Appendix C of this petition. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reversing the de-

cision of the District Court and granting respondent's petition for a writ of habeas corpus, is appended hereto as Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, granting respondent's petition for a writ of habeas corpus under 28 U.S.C. § 2254, was filed on December 3, 1981. Pursuant to 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed within ninety days of the entry of this judgment, on or before March 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Sixth Amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. 28 U.S.C. § 2254 reads in pertinent part as follows:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

STATEMENT OF THE CASE

A. The Trial

The respondent, William Eldridge, was tried before a jury and convicted of three counts of first degree robbery by means of a dangerous and deadly weapon in the Circuit Court of the City of St. Louis on February 18-21, 1975. The evidence adduced by the state at that trial showed the following: at around 6:45 p.m. on November 15, 1974, two men entered John's Tavern, located at 2616 Enright in the City of St. Louis and, drawing pistols, announced a holdup (Tr. G 13-15, 24-25, 38-39, 50, 60-62, 73-75, 84-86, 109-111,

137).[1] The two men were described by the witnesses as follows: (1) a black male around 5'6" in height, wearing a blue-gray jacket and blue striped pants, carrying a silver-colored pistol (Tr. G 15, 20, 40, 61-62, 81, 111, 114, 132); (2) a black male, somewhat taller and described by two witnesses as being somewhat darker-skinned, wearing green and white checked pants with a defective cuff and a dark jacket, carrying a dark-colored pistol (Tr. G 15-16, 19-20, 26, 30, 40, 44, 61-62, 67-69, 79-80, 90-91, 93, 101, 105-106, 111, 114, 116, 122, 133, 137); the latter subject was identified by three witnesses as being respondent (Tr. G 62, 87, 114). Respondent took around two hundred dollars from the tavern owner at gunpoint and he and his accomplice then took wallets, rings and other valuables from some of the ten to twenty bar patrons whom they forced to lie on the floor (Tr. G 14, 26-28, 33, 39, 62-65, 75-78, 86-89, 97-98, 103, 111-113, 115-116, 127-130, 132). The two men then left, but returned a few minutes later and forced all of the people present into a bathroom and told them not to make noise or come out or they would be shot (Tr. G 28, 66, 89, 117-118).

When police arrived at the tavern shortly after the robbery, one of the patrons, Steve Wright, informed them that he recognized one of the robbers: Wright was a deliveryman and in the course of his travels he had observed the man identified as respondent around three times per week in the vicinity of Lucas and Compton Streets (Tr. G 31-33, 83, 91-92). Wright and another victim of the rob-

[1]The transcript of the trial (Respondent's Exhibit G) will hereinafter be identified as "Tr.G." The transcript of the hearing on respondent's state post-conviction motion (Respondent's Exhibit C) will be denoted as "Tr.C.," and the transcript of the testimony before the United States Magistrate will be abbreviated as "Mag.Tr." The exhibits filed in the lower federal courts as "petitioner's" or "respondent's" exhibits will be designated as they were in those courts, even though the legal status of the parties as petitioner and respondent has reversed in this Court.

bery, Winston Gates, went with police to the area described by Wright and, as they passed a house at this location, they saw a man look out of a window in a surreptitious manner (Tr. G 69, 141, 154, 160-161). As the police car made a U-turn, respondent came out of the building, at which point he was stopped by police and was positively identified by both Wright and Gates as one of the robbers (Tr. G 17-21, 29, 34, 69-71, 78-79, 92-93, 142-143, 161-162). At this time, respondent was wearing a long coat which he had not worn in the robbery, but still had on the green and white checked pants with a defective cuff which had been identified by the witnesses (Tr. G 19-20, 29-30, 67, 70, 93, 144-145, 162). Respondent was arrested and a search revealed a loaded .32 caliber pistol clip in his coat pocket (Tr. G 143-144, 148, 163-166). The police immediately returned to John's Tavern, where respondent was identified by several other victims as being one of the robbers (Tr. G 41-42, 116, 120-122, 134, 146, 175-176).

Respondent testified and called three other witnesses in support of his defense of alibi: that he had been at home and at a record store at the time of the robbery (see Tr. G 192-287). At the close of the evidence, instructions and arguments of counsel, the jury found respondent guilty as charged (Tr. G 299). Respondent filed an appeal and his conviction was affirmed. *State* v. *Eldridge*, 543 S.W.2d 500 (Mo.App., St.L.D. 1976).

B. The State Collateral Attack

On February 14, 1977, two years after his conviction, respondent filed a state post-conviction attack on his conviction under Missouri Supreme Court Rule 27.26 in the Circuit Court of the City of St. Louis (Tr. C 2). The only relevant claim in this motion was that

"Movant was denied the effective assistance of Coun-

> sel in that Counsel failed to interview and call necessary *alibi* witnesses, or to produce photographs or compel attendance of a co-defendant, Willie Lee Price, who strongly resembled Movant" (emphasis supplied; Tr. C 4).

At the evidentiary hearing on respondent's motion, the following evidence was developed: following the arraignment of respondent, an Assistant Public Defender, Joseph Warzycki, was appointed to represent him (Tr. C 74). Warzycki obtained the police report of the crime and interviewed respondent several times, obtaining from him a number of potential alibi witnesses (Tr. C 75, 83). From this information, counsel prepared an investigative report and assigned an investigator for the Public Defender, Richard Woods, to interview these and other witnesses (Tr. C 75). One of the potential alibi witnesses was one Edgar Taylor, a clerk at a local record store where respondent claimed he had been at one time on the day of the robbery (Tr. C 25, 75-77). Taylor was interviewed by Woods and advised the investigator that he "did not want to testify and did not want to get involved with the case and would state that he didn't remember anything anyway" (Tr. C 76). On the basis of this response, Warzycki decided not to use Taylor as a witness—as he pointed out in his testimony, "I didn't want an unwilling witness, he'd hurt you" (Tr. C 99). At trial, respondent and all three of his witnesses testified about his claimed trip to the record store, and a record store receipt was introduced as a defense exhibit (Tr. G 201-202, 212-213, 219-220, 229, 233-235, 251, 258, 264-265).[2]

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[2]Respondent also alleged in his state proceeding that defense counsel should have called his cousin, Willie Coburn, to testify that Coburn had borrowed his pistol before the time the robbery occurred (Tr.C. 27-28, 35-37). However, the state courts found that respondent had never told his counsel of Coburn or his purported value as a witness, and this presumptively correct finding was upheld by the federal courts. 28 U.S.C. § 2254(d); see Appendices A and C.

The second witness whom respondent asserts defense counsel should have called was Willie Price, the co-defendant in the case. Respondent's theory was that, because he and Price resembled one another, Price committed the robbery with a third person as an accomplice and respondent's arrest was a matter of mistaken identity. An initial weakness in this theory was that, while respondent and Price resembled one another, the descriptions of the two robbers were also quite similar, varying only in color of complexion and clothing (Tr. G 15-16, 19-20, 26, 30, 40, 44, 61-62, 79-81, 90-91, 93, 101, 105-106, 111, 114, 116, 133, 132-133, 137)—the robber identified as respondent was described as being taller than the other robber, and respondent is in fact three inches taller than Price (Mag Tr. 21; Petitioner's Exhibit P-3). When interviewed by investigator Woods, Price stated that he would take the Fifth Amendment if he were called to testify (Tr. C 90-93, 100, 108). Defense counsel made the decision not to call Price as a witness, noting that Price's assertion of his Fifth Amendment rights on the stand would be harmful to his client (Tr. C 92, 107). As part of his claim regarding Price, respondent asserted that defense counsel was ineffective for not discovering two police reports of crimes other than the robbery at bar; these reports listed Price and another person (not respondent) as suspects in these unrelated crimes.

Thereafter, the Circuit Court of the City of St. Louis issued Findings of Fact and Conclusions of Law, concluding that the representation by defense counsel Warzycki was constitutionally effective (Tr. C 119-122, 124-128). This judgment was appealed to the Supreme Court of Missouri, which affirmed the denial of respondent's motion. *Eldridge* v. *State*, 592 S.W.2d 738 (Mo. banc 1979). In its decision, the Supreme Court further addressed respondent's complaint regarding the police reports of other crimes:

"Hindsight might suggest a duty of counsel to seek out police reports about Price had he known that his client and Price could not possibly have acted together, but he had nothing upon which to base such a belief. The police report of the November 15 robbery, which counsel did have, does not reveal the relative heights of the robbers; nor would anything defendant told his counsel have led another attorney to further investigation of reports on Price. Believing that Price and Eldridge acted together, counsel properly was found by the court to have breached no duty in the asserted failure to seek police reports on Price." *Id.* at 741-742.

C. The Federal Habeas Corpus Petition

On February 19, 1980, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri; because respondent was then on parole under his conviction, the custodial parties were Carolyn Atkins, Chairman of the Missouri Board of Probation and Parole; and John Ashcroft, Attorney General of Missouri. This petition alleged in pertinent part that the defense counsel at trial was ineffective because counsel (a) did not call Willie Price or "an alibi witness," (b) did not discover police reports of other crimes, and (C) "failed to interview *any* of the 15-20 eyewitnesses to the robbery" (emphasis in original). By order of the District Court, the cause was assigned to the Honorable William S. Bahn, United States Magistrate.

On May 4, 1980, following the filing of pleadings and exhibits by petitioners (Atkins and Ashcroft), Magistrate Bahn issued a Review and Recommendation concluding that the claims of respondent were shown to be meritless from the record and recommending that the petition be dismissed (see Appendix C); thereafter, respondent ob-

jected to this recommendation on the basis that the state record was incomplete, whereupon the Magistrate ordered an evidentiary hearing to permit respondent to introduce what futher evidence he desired. At this hearing, respondent called Willie Price, who had pleaded guilty to the robbery of which respondent was also convicted,[3] and his testimony was that he and four other persons had committed the crime but that respondent was not one of them (Mag.Tr. 25, 32-38). Price also claimed that he had never been interviewed by defense counsel's investigator, Richard Woods (Mag.Tr. 24, 28-29). On September 3, 1980, the Magistrate issued a second Review and Recommendation, again concluding that respondent's claims in his habeas corpus petition were without merit and recommending dismissal (Appendix C). The Magistrate characterized the testimony of Willie Price as "highly suspect" and "unpersuasive," noting that "[i]t is not uncommon for [prisoners] to change their testimony once convicted."

On December 9, 1980, the United States District Court, the Honorable James H. Meredith, issued an order dismissing respondent's petition (Appendix B). Thereafter, respondent filed an appeal in the United States Court of Appeals for the Eighth Circuit, advancing the same claims regarding his counsel as set out above. On December 3,

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[3]Price pleaded guilty some three months *after* respondent's evidentiary hearing on his state post-conviction motion (Tr. C 23; Mag.Tr. 27). The counsel representing respondent in this proceeding interviewed Price in the absence of Price's counsel and then sought to call him as a witness at the evidentiary hearing, again without counsel, for the purpose of getting Price to testify that he (Price) committed the crime while respondent did not (Tr. C 72-74, 108-110, 112-114). This was a flagrant violation of the Code of Professional Responsibility. Missouri Supreme Court Rule 4, DR 7-104(A)(1). Throughout the federal proceedings, respondent's counsel has nevertheless accused the *state* of "successfully prevent[ing] Price's testimony in the state hearing" (petitioner's federal appellate brief at 27, 34).

1981, the Eighth Circuit reversed and vacated the judgment of the District Court and directed that a writ of habeas corpus issue (Appendix A).[4] The stated basis for the Eighth Circuit's ruling was that respondent's trial defense counsel was constitutionally ineffective because (a) he "failed to properly investigate or interview eyewitnesses to the robbery"; and (2) he failed to personally interview Edgar Taylor and Willie Price or discover the police reports of other crimes. To avoid duplication, the details of the Eighth Circuit's holding will be discussed in the Argument, *infra*.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The basis for the District Court's jurisdiction in this cause was 28 U.S.C. § 2254.

[4]At the time of the issuance of this order, respondent was no longer in state custody; he had been discharged from parole on August 20, 1981.

ARGUMENT

The essential issue in this petition is the standard under which the investigatory efforts of a trial defense counsel are to be deemed constitutionally effective or ineffective. It is submitted by petitioners that the decision of the Eighth Circuit in the present cause merits review by this Court because it is directly in conflict with the decision of the Supreme Court of Missouri en banc in this case,[5] is contrary to several of this Court's decisions,[6] is inconsistent with the prior decisions of the Eighth Circuit, and will work grave injury to the interests of justice not only in the State of Missouri but in all states within the Eighth Judicial Circuit.

I. Decisional Background

It has been established since 1963 that constitutional "due process" requires that a person accused of a felony in state courts be represented by counsel if he so desires. *Gideon* v. *Wainwright*, 372 U.S. 335, 339-345 (1963). Long before *Gideon*, it was recognized that a necessary concomitant of the right to counsel is the right to the effective assistance of counsel. *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940); *Reece* v. *Georgia*, 350 U.S. 85, 90 (1955); *Cuyler* v. *Sullivan*, 446 U.S. 335, 343-344 (1980). As to the meaning of the term "ineffective assistance of counsel" and the application of this term to the conduct of trial defense attorneys, however, this Court has provided little guidance.[7] In conse-

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[5]See United States Supreme Court Rule 17.1(a).

[6]See United States Supreme Court Rule 17.1(e).

[7]In *McMann* v. *Richardson*, 397 U.S. 759 (1970), which concerned the voluntariness of a guilty plea, this Court spoke in terms of whether the plea was the product of "reasonably competent advice" and whether such advice "was within the range of competence demanded of attorneys

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quence, the various federal judicial circuits have applied differing and somewhat inconsistent standards for determining effectiveness *vel non*. See, e.g., *Rickenbacker* v. *Warden, Auburn Correctional Facility*, 550 F.2d 62, 65-66 (2nd Cir. 1976); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1328-1330 (9th Cir. 1978), *cert. denied* 440 U.S. 974 (1979); *United States* v. *Decoster*, 624 F.2d 196, 200-210 (D.C.Cir. 1976). This diversity of approach is, to say the least, not conductive to the uniformity and consistency of decisional law that constitutional questions deserve. However, it is not absolutely necessary (though it would be desirable) to resolve this conflict of judicial circuits in order to address the issues presented in the case at bar.

The standard propounded by the Eighth Circuit on the present issue is as follows:

> "to prevail on a claim of ineffective assistance of counsel, a defendant must show 'that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby.' *United States* v. *Hood*, 593 F.2d 293, 297 (8th Cir. 1979); *United States* v. *Easter*, 539 F.2d 663, 666 (8th Cir.), *cert. denied*, 434 U.S. 844, 98 S.Ct. 145, 54 L.Ed.2d 109 (1976). Petitioner bears a heavy burden of proving such prejudice resulted from alleged ineffective assistance of counsel. *Witham* v. *Mabry*, 596 F.2d 293, 298 (8th Cir. 1979); *Morrow* v. *Parratt*, 574 F.2d 411, 413 (8th Cir. 1978); *Johnson* v. *United States* 506 F.2d 640, 645 (8th Cir. 1974)." *Drake* v. *Wyrick*, 640 F.2d 912, 914 (8th Cir. 1981).

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in criminal cases." *Id.* at 770-771; see also *Tollett* v. *Henderson*, 411 U.S. 258, 264-266 (1973). It is uncertain whether this language was intended as a standard for determining ineffectiveness and whether it applies to cases not involving guilty pleas.

Petitioners submit that any reasonable review of the record in the present cause clearly shows that the Eighth Circuit misapplied its own standard in concluding that the trial defense counsel was constitutionally ineffective in this case.

II. Alleged Failure to Interview Eyewitnesses

The first of two grounds assigned by the Eighth Circuit for its ruling is that the trial defense counsel "failed to properly investigate and interview eyewitnesses to the robbery"; the court states that neither defense counsel nor his investigator interviewed the persons in John's Tavern at the time of the robbery, including those persons used as state's witness, and cites *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974) for the proposition that the failure to interview any prosecution witnesses is, *per se*, ineffective assistance of counsel. See *Id.* at 211-218.

This holding vividly demonstrates the Eighth Circuit's intent to arrive at the conclusion it reached regardless of the facts of the present case—the fact is that there is ***no evidence*** to support that court's assertion that no prosecution witnesses were interviewed by the defense. The reason for the dearth of evidence on this subject is that the issue was never properly raised in or reviewed by any state court. At respondent's trial, on his direct appeal and in his state post-conviction motion, the matter of investigation of eyewitnesses was not raised by respondent—the only issue asserted was that counsel should have interviewed and called certain potential *defense* witnesses (Tr. C 4-7). The opinion of the Eighth Circuit attempts to surmount this patent failure to exhaust state remedies as follows:

> "Although the state asserts that counsel did not present the claim of failure to properly investigate and

> interview all known eyewitnesses to the state court, the record demonstrates otherwise. Petitioner's original [state post-conviction] petition focused upon counsel's failure to interview and call Price, Taylor and Colburn [sic]; *however, his brief before the Missouri Supreme Court as well as his posthearing motions relate to this overall claim raised here*" (emphasis supplied). See Appendix A.[8]

This is a blatant misstatement of the law. Under Missouri law, appellate review following the denial of a post-conviction motion is *limited* to the claims raised in the motion; if a contention is not contained in the motion, it *cannot*, as a matter of law, be asserted or reviewed for the first time on appeal. *Schleicher* v. *State*, 483 S.W.2d 393, 394 (Mo. banc 1972); *Check* v. *State*, 457 S.W.2d 278, 280 (Mo. 1970); *Davis* v. *State*, 586 S.W.2d 822, 824 (Mo.App., S.D. 1979). This fact has repeatedly been recognized by the Eighth Circuit, *Drake* v. *Wyrick*, *supra*, at 916; *Tyler* v. *Swenson*, 527 F.2d 877, 880 (n. 4) (8th Cir. 1976), *cert. denied* 425 U.S. 915 (1976), and these authorities were brought to the court's attention in the briefing and argument of this case.[9] Although it has been said that the failure

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[8]This assertion is factually inaccurate: the alleged failure to interview eyewitnesses was *not* raised in respondent's Missouri Supreme Court brief (Respondent's Exhibit D)—it was in fact asserted for the very first time in his Motion for Rehearing after the Supreme Court's decision (Petitioner's Exhibit P-13).

[9]Another theory advanced by respondent as to exhaustion (which theory was not adopted or discussed in the Eighth Circuit's opinion) was that the issue of investigation of eyewitnesses was raised in "petition for a writ of habeas corpus" filed in the Missouri Supreme Court; this "petition" was filed on September 14, 1977, after the denial of his state post-conviction motion, and was summarily denied by the Supreme Court on that same day. The difficulty with this theory is that Missouri law does not permit an attack on the validity of a criminal conviction by a habeas corpus petition in an appellate court; such attacks can *only*

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to exhaust state remedies is not jurisdictional, see *Ballard* v. *Maggio*, 544 F.2d 1247, 1249 (5th Cir. 1977), this Court has emphasized on numerous occasions that the interests of comity are sufficiently compelling to require that the state courts be given the opportunity to review a claim before it is advanced in the federal forum. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-491 (1973); *Picard* v. *Connor*, 404 U.S. 270, 275-278 (1971). Moreover,

> "it is not sufficient merely that the federal habeas applicant has been through the state courts. This rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts" (citations omitted). *Picard* v. *Connor*, *supra*, at 275-276.

The Eighth Circuit has ignored all of these principles: in vacating the holding of the Missouri courts (including a decision of the Missouri Supreme Court en banc), it stretches to reach an issue which was never presented to the state courts, citing as excuses that (a) the claim was before the Missouri Supreme Court—a flatly incorrect statement; and (b) the "overall" issue of investigation

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Footnote continued
be made by a post-conviction motion (Missouri Supreme Court Rule 27.26) in the Circuit Court. *Wiglesworth* v. *Wyrick*, 531 S.W.2d 713 (Mo. banc 1976). Thus, as the federal courts have recognized, the filing of such a habeas corpus petition does nothing to exhaust state remedies. *Gregg* v. *Wyrick*, 449 F.Supp. 969, 971-972 (W.D. Mo. 1978); *White* v. *Wyrick*, 432 F.Supp. 1316, 1317 (W.D. Mo. 1977).

was presented in state courts—an assertion refuted by the record (see Tr. C 4-7) and directly contrary to the holding of this Court in *Picard* v. *Connor*, *supra*.[10] This, in and of itself, constitutes substantial ground for review by this Court. United States Supreme Court Rule 17.1(e).

However, the absence of exhaustion is by far the less striking of the two notable facts concerning the Eighth Circuit's addressing of the present issue: much more astonishing is the fact that *there is no evidence to support that court's conclusion that the eyewitnesses to the robbery were not interviewed by the defense*. As noted in the Statement of the Case, *supra*, defense counsel assigned an investigator to interview witnesses and report back to counsel as to what they said (Tr. C 75); this was done, and counsel proceeded to personally interview those persons he intended to use as witnesses for the defense (Tr. C 76-79, 91-92, 99-100, 107). In his brief before the Eighth Circuit, respondent cited the testimony of defense counsel to the effect that counsel did not *personally* interview the eyewitnesses to the crime (Tr. C 89-90, 96); this citation is highly misleading in that it says nothing of whether these persons were interviewed by counsel's investigator. Moreover, at least one question and answer in this ex-

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[10]Although not asserted in this present decision, the Eighth Circuit has on occasion stated that a petitioner's failure to present an issue in his state post-conviction motion does not prevent federal review because state rules prohibit the filing of successive post-conviction motions if "the ground could have been raised in the prior motion." Missouri Supreme Court Rule 27.26(d); see *Coney* v. *Wyrick*, 532 F.2d 94, 99 (8th Cir. 1976). However, the present record is utterly silent as to whether or not respondent herein could have previously raised the present claim, and respondent has made no effort whatever to test this issue by filing such a motion. If one assumes that Rule 27.26(d) acted as a bar to respondent's filing of a second motion, however, it would seem that respondent has committed a procedural waiver such that the holding of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) would apply.

amination tends to indicate that eyewitnesses *were interviewed:*

> "Q. Now, your investigator interviewed several people. At any time, did he interview anyone at the tavern that was willing to testify that Mr. Eldridge wasn't the man or one of the men that was involved in the robbery at John's Tavern?
>
> A. He did not." (Tr. C 107).

In short, respondent not only failed to bear the "heavy burden" necessary to establish ineffectiveness on the purported basis that the eyewitnesses to the crime were not interviewed, he failed to bear *any burden at all* on this matter. Nor does the Eighth Circuit's listing in its opinion of things that counsel "would have discovered" by interviewing the state's witnesses in any manner ameliorate the lack of evidence: these matters derive their significance by hindsight, from facts not known to counsel prior to trial and not reasonably discoverable by him (see Part III, *infra*)—it would be eminently possible to interview the eyewitnesses in this case without learning of the matters in question or without being aware of their significance. Since the holding of the Eighth Circuit regarding investigation of eyewitnesses is utterly without foundation, it would be both a miscarriage of justice in this case and a clear encouragement of future judicial abuses for this Court to deny review in this case.

III. Alleged Failure to Investigate Defense of Misidentification

The remaniing argument advanced by the Eighth Circuit to justify its decision is that defense counsel "failed to adequately investigate and provide evidence relating to a substantial defense of misidentification." As nearly as petitioners can determine, the court's theories as to

the manner in which defense counsel did not exercise the "skill and diligence that a reasonably competent attorney would perform under similar circumstances," *Drake* v. *Wyrick, supra,* at 914, are essentially three. First, the court faults counsel for not discovering two police reports of two other robberies on two different dates in which Willie Price *but not respondent* was a suspect (Petitioner's Exhibits P-2 and P-4). The discovery of these reports, the court asserts, would have produced investigatory leads to support the theory that Price and another person not respondent committed the robbery for which respondent was later convicted. Second, the Eighth Circuit states that counsel should have further investigated the statement in the police report of the crime at bar (Petitioner's Exhibit P-3) that one witness had identified respondent as a participant in a previous robbery; it is claimed that investigation of this reference might have demonstrated that Price was the actual guilty party in that crime. Finally, the court finds defense counsel ineffective because counsel did not *personally* interview Willie Price and Edgar Taylor to determine whether or not they would cooperate by testifying, even though this had already been done by defense counsel's investigator and unequivocal negative answers had been received.[11] The Eighth Circuit's rationale is aptly summarized in the following language in the court's opinion:

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[11]In footnote 5 of the court's opinion (Appendix A), it first asserts that the state Supreme Court's assertion that the decision of defense counsel not to call Price or Taylor was a matter of trial strategy is presumptively correct under *Sumner* v. *Mata,* 449 U.S. 539 (1981); and 28 U.S.C. § 2254(b). In virtually the next sentence, the court states that defense counsel's decision not to call these witnesses "was not so much trial strategy as it was an accommodation to his own inadequate trial preparation." It is difficult to perceive how both could be the case, or how the Eighth Circuit's argument could be anything other than an effort to evade the holding of *Sumner* v. *Mata, supra.*

> "Thus, defense counsel's preparation and subsequent trial strategy was *based in part upon his own conclusory decision that Eldridge and Price were the two robbers.* Once he made that conclusion, it is easy to see why he failed to investigate further, why he failed to pursue calling Taylor as an alibi witness, and why he made no further effort to call Price as a witness" (emphasis in original). Appendix A.

The Eighth Circuit's rationale will not withstand close scrutiny. As that court has itself stated, "the exercise of reasonable judgment, even when hindsight reveals a mistake in that judgment, does not render a lawyer negligent or lacking in competence in rendering his services" (footnote omitted). *Reynolds* v. *Mabry*, 574 F.2d 978, 979 (8th Cir. 1978); see also *Robinson* v. *United States*, 448 F.2d 1255, 1256 (8th Cir. 1971). "[C]laims of failure to investigate . . . must be appraised in light of the information available to the attorney." *United States* v. *Decoster*, *supra*, at 209. From his meetings with respondent and the police report of the robbery, defense counsel herein had the following information available to him: (1) that respondent was claiming a defense of alibi (Tr. C 75-76); (2) that the police report on the robbery described the robbery subsequently identified as respondent as being a black male around 6'0" in height and about 160 pounds with a dark complexion; and the other robber as being a black male about 6'2", 140 pounds with a medium light complexion (Petitioner's Exhibit P-3); (3) that respondent fit the description given and had been identified by several of the victims (*Id.*); (4) that this identification was supported by other evidence, notably respondent's distinctive clothing and a pistol clip found in his possession at the time of his arrest (*Id.*); (5) that Willie Price was also charged with the same robbery (Tr. C 90); and (6) that, according to respondent, he and Price resembled

one another (Tr. C 91). Under these facts, defense counsel had not the slightest reason to believe that any theory of misidentification between respondent and Price was possible in this case. Even had respondent and Price been identical twins (which they were not—respondent is three inches taller than Price, just as the witnesses' descriptions indicated), the fact remained that the description of the two robbers were *essentially the same* as to physical characteristics (remarkably so for chance observers who had imbibed alcoholic beverages and then been placed in a stressful situation), and which descriptions were in any event based as much on clothing as on height, weight and skin color (see Tr. G 15, 19-20, 26, 29-30, 40, 44, 62, 67-70, 80-81, 90-91, 93, 100-101, 105-106, 114, 116, 122, 133, 137).

In short, the holding of the Eighth Circuit is a tautology: defense counsel should have had information regarding a defense of misidentification because there existed information regarding a defense of misidentification. Under the facts before him, defense counsel had no reason to be aware of police reports relating to other crimes in which Willie Price was a suspect, and he would have had no reasonable cause to believe that such reports would have been relevant or helpful to his case even if he had been aware of them. An identification of respondent by state's witness Winston Gates as being involved in a previous robbery would if anything have been harmful to respondent, as there existed no known grounds to suspect mistaken identity;[12] as counsel noted, "Mr. Eldridge had

[12]Throughout his sojourn in the state and federal courts, respondent has cited the testimony of state's witness Gates that he identified respondent as one of the robbers "at the police station," and argued that this reference actually signified a lineup which Gates attended in connection with another crime where he identified Willie Price (see Petitioner's Exhibit P-1). This inference was seized upon by the Eighth

(Continued on next page)

his problems in front of that jury and I wasn't about to compound them by bringing in other crimes" (Tr. C 86). Finally, the Eighth Circuit's notion that an attorney is incompetent and constitutionally ineffective because he relies upon interviews of potential witnesses by his investigator rather than doing such work personally is a fantastic and patently unreasonable contortion of the holding of *McQueen* v. *Swenson, supra.*[13] Such a holding, if sustained, would effectively eliminate the use of legal investigators, students and interns and would actually result in worse representation of criminal defendants by overworked public defenders and defense attorneys rather than better. Petitioners are aware of no authority from this or any other court which requires or suggests such a preposterous result. In any event, it is difficult to perceive how defense counsel might be deemed ineffective for not personally interviewing Price and Taylor under the facts available to him: no basis existed for him to believe that Price would have been of assistance in advancing the sole defense known to him in the case (alibi), and Taylor's testimony would have been merely cumulative to that of the four alibi witnesses (including respondent) who were called at trial. Under all of the facts in this case, the holding of the Eighth Circuit on the present issue is mani-

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Footnote continued
Circuit as further evidence of defense counsel's "ineffectiveness." The difficulty with this theory is that respondent has not offered the slightest evidence to support his desired inference—there is nothing in the record which indicates that Gates did not go to the police station after the robbery at bar or that his identification of respondent was mistaken. See Tr. C 16, 18-19, 71, 82.

[13]This holding is particularly astonishing in the present case given the absence of credible evidence that the investigator was inaccurate in his characterization of Price's and Taylor's responses. With regard to Price's testimony before the United States Magistrate (Mag.Tr. 18-38), see the Magistrate's Review and Recommendation dated September 30, 1980 (Appendix C).

festly unjust and contrary to the previous decisions and the holdings of this Court.

IV. The Importance of This Case

It requires no scholarly acumen to discern this Court's long-standing reluctance to enter the morass of ineffective-counsel claims and establish a uniform test or standard applicable to this issue.[14] "Claims of ineffective assistance of counsel have never been a favorite of the legal profession. For this reason that law in the field has been developed on a largely ad hoc basis with few guidelines for either the courts or defense attorneys to follow."[15] Thus, while petitioners might suggest that a landmark decision from this Court setting standards or guidelines for ineffectiveness of counsel is sorely needed, it is neither a necessity in this case nor is it required to make a review of the present cause worthy of the time of this Court. Rather, petitioners submit, the review of this cause is essential in the interests of justice for three reasons. The first such reason is the impact of the Eighth Circuit's present decision upon all of the state and federal courts in that judicial circuit. As noted above, the present decision seems to stand for the proposition that a defense attorney may be constitutionally ineffective for "failure to investigate" even though he has interviewed a potential witness through a legal assistance or investigator; that counsel must, at least in some circumstances, independently confirm the person's statements by interviewing them himself. The implications of this holding upon both the courts and defense attorneys (particularly public defenders and other appointed counsel) are staggering. To avoid the danger of being held ineffective, attorneys would be required to

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[14]See Gard, "Ineffective Assistance of Counsel–Standards and Remedies," 40 Mo.L.Rev. 483, 504-505 (Fall, 1976).

[15]*Id.* at 505.

abandon any effective use of assistants, interns or investigators and conduct all interviews of potential witnesses themselves; if an investigator interviewed someone who was not called as a witness and that person's anticipated testimony were later to be deemed significant, defense counsel would be "incompetent" under the Eighth Circuit's current theory. Equally important is the effect upon the state and federal courts: it is difficult in the extreme to perceive how the present holding is to be harmonized with the prevailing standard of effectiveness of counsel in the Eighth Circuit—the customary skill and diligence exercised by a reasonably competent attorney—when the use of investigators and legal assistants to interview potential witnesses is universal practice throughout the United States (and, petitioners submit, reasonably so).

A second major ground for granting a review of this case is the Eighth Circuit's blatant disregard of this Court's decisions in *Preiser* v. *Rodriguez, supra;* and *Picard* v. *Connor, supra,* regarding the exhaustion of state remedies and the interests of federal-state comity. The prosecution and conviction of respondent and his appeals and collateral attacks thereon have occupied the resources of the Missouri courts and the attorneys representing the state for five years. The culmination of that process was a decision by the Supreme Court of Missouri, en banc, reviewing all of the claims advanced before it by respondent regarding the effectiveness of his legal representation and finding that such representation was constitutionally proper. *Eldridge* v. *State, supra.* Having completed this exercise, respondent entered the federal forum and raised an entirely new claim—that defense counsel was ineffective because he allegedly did not interview the eyewitnesses to the robbery—which claim had never been presented in any reviewable manner in the state courts

and concerning which the state evidentiary record was essentially silent. In reversing the District Court's decision, and overturning the Missouri Supreme Court's holding on the question of ineffectiveness, the Eighth Circuit not only falsely stated that respondent's claim had been before the state courts but disregarded the Missouri Supreme Court's factual conclusions while purporting to adopt them. It is impossible to conceive of a more patent violation of the exhaustion requirement as stated in *Preiser, Picard* and 28 U.S.C. § 2254(b), or a more gross and egregious offense against the comity which this Court has held must exist between the state and federal judicial systems. If the case at bar does not present the most compelling grounds for a reaffirmance of these principles, then no such case exists.

Finally, the present cause cries out for review by this Court because it presents the clearest possible instance of an abuse by a federal court of its powers and the disregard of its jurisdiction under 28 U.S.C. § 2254. As discussed at length in this petition, the grounds assigned by the Eighth Circuit for its holding that respondent's constitutional rights were violated are utterly pretextual; never before has this counsel observed an opinion wherein a court so completely ignored its own prior decisions (*Drake* v. *Wyrick, supra;* and *Tyler* v. *Swenson, supra*) or made a factual conclusion which was so completely unsupported by the evidence. The true reason for the Eighth Circuit's ruling is apparent from the court's opinion and the surrounding facts: the court accepted the invitation of respondent's counsel (which invitation counsel has proffered to each state and federal court through which he has passed) to retry the issue of respondent's guilt, and in its capacity as ad hoc jury concluded that he

was innocent.[16] This, of course, is an improper basis for the court's ruling. Respondent had a trial before twelve unbiased jurors and that jury viewed and heard the witnesses and evidence and concluded that respondent was guilty. There can be no possible doubt that the jury could reasonably have reached that conclusion from the evidence, and respondent's repeated citations of evidence at his trial which was favorable to him (which evidence the Eighth Circuit repeatedly adopted) is irrelevant. *Jackson* v. *Virginia*, 443 U.S. 307, 309 (1979). The unstated but clearly discernible effort by the Eighth Circuit to reverse the verdict of a jury because it is not in agreement with that verdict is unacceptable, and this miscarriage of justice urgently warrants the review of this Court.

[16]As noted by the District Court in its Order (Appendix B), "[w]e are impressed that petitioner would like to retry his case, via federal habeas corpus, in the federal district court. Section 2254 and this Court are not vehicles for that process."

CONCLUSION

In view of the foregoing, the petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 81-1106

William Eldridge, *Appellant*, v. Carolyn Atkins, Administrator, State Board of Probation & Parole, and Attorney General of Missouri, *Appellees.*	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: July 22, 1981

Filed: December 3, 1981

Before Lay, Chief Judge, STEPHENSON and McMILLIAN, Circuit Judges.

LAY, Chief Judge.

William Eldridge appeals from the denial of a petition for writ of habeas corpus in the district court for the Eastern District of Missouri. Eldridge was convicted of three counts of robbery first degree in the circuit court of the City of St. Louis. His conviction was affirmed on appeal by the Missouri Court of Appeals. *State* v. *Eldridge*, 543

S.W.2d 500 (Mo.App. 1976). He was sentenced to five years in prison; he has now served his sentence. At the time his petition was filed in federal district court he was on parole and sought his discharge from the custody of Carolyn Atkins, the Administrator for the Missouri State Board of Probation and Parole.[1] Although petitioner presents various attacks on his conviction, his primary allegation is that he was not afforded effective assistance of counsel at his trial in state court.[2] The federal district court, the Honorable James H. Meredith presiding, denied his petition. The decision to deny was based primarily upon the report and recommendation of the magistrate. In both the Missouri Supreme Court as well as in the federal district court, the rejection of petitioner's claims was based on the finding that trial counsel's failure to call certain witnesses was related to trial strategy. We view petitioner's claim more broadly and find as a matter of law that he has been denied effective assistance of counsel in violation of the fourteenth amendment of the Constitution. We find that the state public defender who served as trial counsel (1) failed to properly investigate and interview eyewitnesses to the robbery and (2) failed to adequately investigate and provide evidence relating to a substantial defense of misidentification. We reverse and remand with directions to the trial court to grant the writ of habeas corpus.

Facts.

About 6:30 in the evening of November 15, 1974, two black males entered John's Tavern in St. Louis, drew pistols, announced a holdup, and told everyone to lie on

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[1]Petitioner's parole ended August 20, 1981. Because of collateral consequences which can follow from his conviction, the expiration of petitioner's sentence has not mooted this cause. *See Carafas* v. *LaVallee*, 391 U.S. 234 (1967).

[2]Petitioner raised this contention first in a state 27.26 proceeding and thereafter in the Missouri Supreme Court. His claim was rejected. *See Eldridge* v. *State*, 592 S.W.2d 738 (Mo. 1979).

the floor. One man went behind the bar, faced John Wilfert, the tavern owner, and told him to hand over all the money from the cash register. The other man remained at the back of the tavern. After taking the money from Wilfert, the two men told the patrons to throw their wallets and purses out on the floor. Both robbers then searched these for cash and valuables.

After the robbers left the scene, John Wilfert called the police. The police arrived shortly after the call was made and obtained a description of the two men from the victims of the robbery. At trial a police officer testified that the description given was as follows:

> One man was light complected, very close haircut, thin build. The other was taller, about six feet, dark complected and wearing a dark coat and green checked pants. Both were carrying guns.

This testimony contradicted the police report. On the report the description set forth was that the light compected man was said to be the taller and carrying a silver-colored gun.

Steven Wright, one of the victims, delivered auto parts in that neighborhood. He told police that he had often seen the man he believed was the robber during the course of his deliveries. Winston Gates, another victim and a friend of Wright, told police that *one of the subjects involved in the robbery had robbed the tavern eight days before.* Both Gates and Wright said they had previously seen the *tall, light complected* man entering a house on the 3200 block of Lucas. Wright and Gates went with the police to the area Wright had described. They saw William Eldridge, who is very dark complected, descending the steps of the home of Constance McDonald, a cousin with whom Eldridge had been staying during his visit to St. Louis. Wright told police that Eldridge was the robber and Gates concurred.

Eldridge was arrested and searched. At this time petitioner was wearing a long gray fur overcoat and green and white checked pants. A chrome ammunition clip and some bullets were found in the pocket of his overcoat. The police then took Eldridge to John's Tavern where Dorothy Wright also identified him as the robber who went behind the bar. Neither Wilfert, the tavern owner, nor any other eyewitness, identified him.

Eldridge was jailed. He lacked adequate funds to retain an attorney beyond his arraignment. An Assistant Public Defender was appointed to represent him. Upon receiving the case, appointed counsel obtained the police report. He interviewed Eldridge several times, obtaining from him the names of a number of potential alibi witnesses. From this information, counsel prepared an investigative report and assigned the Public Defender's investigator, Richard Woods, to interview these and other potential witnesses. Eldridge told his counsel that he had not been involved in the robbery. He also told him that except for the time he purchased two records at a neighborhood record shop, he had been at the home of his cousin when the robbery occurred. He had his cousin deliver to counsel the receipt from the record shop, upon which appeared the name of the sales clerk, Edgar Taylor. Petitioner asked his counsel to call Taylor as a witness. Petitioner also told his counsel that there was a man in the same jail who looked remarkably like himself, and that he had heard that the other fellow, Willie Price, was charged *with the same robbery.* Price had been arrested later and charged with the same robbery. Eldridge gave his counsel a newspaper which had Price's picture over Eldridge's name, and an accompanying story which included a statement charging that Eldridge had robbed John's Tavern a week prior to the November 15 robbery. Woods interviewed both Taylor and Price. Price told Woods that he would take the fifth amendment if

called. Taylor stated that if called he would testify that he did not want to get involved and would say that he did not remember anything.

There is a dispute whether petitioner asked his attorney to call Willie Coburn as a witness. Coburn was Eldridge's cousin. At a postconviction hearing he testified that Eldridge owned a silver-colored pistol with pearl handles. He testified further that Coburn had the gun at his house at the time of the robbery. Coburn stated that he made himself available at the trial for the purpose of offering this corroborating testimony. Petitioner's counsel testified that, contrary to petitioner's claim, he had no recollection of ever being given Coburn's name. The Missouri Supreme Court concluded that counsel was not told about Coburn. *Eldridge*, 592 S.W.2d at 741. Although the investigator *reported that Taylor did corroborate* Eldridge's alibi and that *Price did resemble Eldridge*, no further attempt was made by trial counsel to get either of them to testify.

At trial Eldridge denied any involvement with the robbery. He testified that on November 15, 1974, he returned to the home of Constance McDonald after a few days stay with Willie Coburn. He returned at 2:30 that afternoon. From 2:30 until 6:00 he watched television with his cousin and her family. At 6:00 he walked to the neighborhood record store to purchase two records. He returned to the house at approximately 6:20. He testified that he had put the clip and bullets in his overcoat pocket because the children in the house had been into his suitcase and were playing with them.

Several family members corroborated Eldridge's testimony and the record receipt was introduced. The defense attorney's attempts at impeaching the prosecution witnesses' testimony consisted of trying to show that they had been drinking, and that the light was too poor to make

a reliable identification. At the close of the evidence, instructions, and arguments of counsel, the jury found petitioner guilty as charged.

Ineffective Assistance of Counsel.

To prevail on his claim of ineffective counsel, petitioner must show "that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and that he was prejudiced thereby." *Drake* v. *Wyrick*, 640 F.2d 912, 914 (8th Cir. 1981) *quoting United States* v. *Hood*, 593 F.2d 293, 297 (8th Cir. 1979). There is a presumption that counsel has rendered effective assistance. *Thomas* v. *Wyrick*, 535 F.2d 407, 413 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976). It is also true that petitioner bears a heavy burden of proving that prejudice resulted from alleged ineffective assistance of counsel. *Drake*, 640 F.2d at 914; *Tyler* v. *Wyrick*, 635 F.2d 752, 754 (8th Cir. 1980); *Johnson* v. *United States*, 506 F.2d 640, 645 (8th Cir. 1975), *cert. denied*, 420 U.S. 978 (1975). The exercise of reasonable judgment, even when hindsight reveals a mistake in that judgment, does not render a lawyer negligent or lacking in competence in rendering his services. *Reynolds* v. *Mabry*, 574 F.2d 978, 979 (8th Cir. 1978).

Courts will often cast the standard of customary skill and diligence in terms of an attorney's duty. In regard to trial counsel's duties to investigate possible defenses and to call witnesses, we have adopted the following standard:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless

> of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and the Defense Function § 4.1 (Approved Draft 1971).

See also Reynolds, 574 F.2d at 980; *Garza* v. *Wolff*, 528 F.2d 208 (8th Cir. 1975); *Wolfs* v. *Britton*, 509 F.2d 304, 309-11 (8th Cir. 1975); *McQueen* v. *Swenson*, 498 F.2d 207, 216 (8th Cir. 1974).

Petitioner's claims of failure to properly investigate and interview all known witnesses, failure to call certain witnesses and failure to present the defense of mistaken identification are all interrelated. Although the state asserts that counsel did not present the claim of failure to properly investigate and interview all known eyewitnesses to the state court, the record demonstrates otherwise. Petitioner's original 27.26 petition focused on counsel's failure to interview and call Price, Taylor, and Colburn; however, his brief before the Missouri Supreme Court as well as his posthearing motions relate to this overall claim raised here. We conclude that the record as it relates to the claim of ineffective counsel cannot be divided piecemeal when the question is whether an individual has been wrongfully convicted. From the beginning of this case petitioner has vigorously asserted his innocence. He has long made the claim that his trial counsel failed to properly investigate and pursue his defense of mistaken identification. Our analysis of the record convinces us that with proper investigation this defense should have been pursued and presented at the petitioner's state trial. We find that petitioner was materially prejudiced by counsel's failure to do so.

The state urges that petitioner's argument is based primarily on hindsight and that trial counsel cannot be faulted for not pursuing investigative leads of which he

was not aware. This argument relates primarily to the existence of other police reports relating to Price, Eldridge's look-alike. Counsel did obtain the police report of the November 15 robbery, but did not obtain three other police reports. These were reports of two other robberies and one police lineup; Eldridge was not named as a participant in either of these two robberies or in the lineup. One police report was a report of the November 7 robbery of John's Tavern which implicated Price. The second was a report of a robbery occurring on November 24, 1974, that led to the capture of Price and his 5'4" accomplice, Hosea Simpson. The third report, dated November 26, 1974, related to a lineup in which Winston Gates, an eyewitness to the November 15 robbery who implicated Eldridge, identified Price as one of the robbers in both the November 7 and November 15 robberies.

Petitioner argues that his trial counsel failed to properly investigate and obtain the other reports. On the surface, trial counsel should not be faulted for failing to investigate police reports which did not implicate Eldridge. However, our study of the record demonstrates that through the exercise of reasonable diligence in the investigation and interviewing of the eyewitnesses to the November 15 robbery listed on the November 15 police report, reasonable counsel would have been alerted to the relevancy of these other reports. The positive identification of Price as a definite robbery suspect in both the November 7 and the November 15 robberies, along with the description of the two November 15 robbers, was by itself enough evidence to provide strong indication that Price and Eldridge did not act together in the November 15 robbery. Proper investigation would have uncovered many other factors which compel the same conclusion.

Trial counsel testified that he requested Woods to investigate the robbery. At petitioner's request Woods did

interview Edgar Taylor, who was a clerk at the record shop. Woods also talked to Willie Price after petitioner told trial counsel that he had just learned of Price when Price was brought to the jail after the November 24 robbery. There is little evidence that Woods interviewed any other witnesses.

Counsel did not interview Taylor, Price, or any of the prosecution witnesses. Counsel testified that it was his policy not to talk to defense witnesses unless they were to be used. What is more significant, however, is that counsel testified that he did not interview any of the prosecution witnesses. Although this is somewhat equivocally disputed by the state, the record is clear that counsel did not interview Steve Wright, Dorothy Wright, Winston Gates, Benny Simms, John Wilfert, Henry Lawrence, or Mary Brown, all of whom the police listed as eyewitnesses to the November 15 robbery. There is no evidence that Woods interviewed John Wilfert, the tavern owner who had a face-to-face confrontation with the robber who went behind the bar. An investigation of the prosecution witnesses would have disclosed sufficient facts to alert competent counsel to seek out the police report of the November 7 robbery and the other reports pertaining to Price's arrest and lineup.

For example, an interview of even three of the prosecution witnesses would have been extremely helpful. Both Steve Wright and Gates went with the police immediately after the robbery to locate the "light complected" and "taller" robber in the 3200 block of Lucas where he had been seen on *numerous* occasions. They saw Eldridge coming down the steps of a house. The police arrested and searched Eldridge, finding a chrome ammunition clip and some bullets in his overcoat pocket. He was taken to the tavern where Steven Wright's wife, Dorothy, identified him. Interviewing *these* witnesses would have revealed several relevant facts:

(1) Both Gates and Wright stated they could identify one of the robbers (the one they went to look for when they found Eldridge). Gates originally claimed that the tall, light complected robber was one of the men who robbed the tavern a week and a half before (November 7). Eldridge claimed that he was in Milwaukee at that time; this claim could have been easily verified. Also, Gates testified at trial on the motion to suppress that he had not seen either robber before the November 15 robbery. Yet the police reports disclose that he stated he had seen Price (who he thought was Eldridge) in the tavern robbery of November 7. This fact was not brought out at trial.

(2) When Gates and Wright went with the police they were looking for a tall, light complected subject. Eldridge, in contrast, is very dark complected.

(3) At a subsequent lineup Gates, Dorothy Wright, Lawrence, and Simms implicated Price in the November 15 robbery. Gates also picked him out as the November 7 robber. There is no clarification in the record as to whether Gates thought the man arrested on the day of the robbery was the same man he identified in the lineup. Evidently no one, including the prosecutor, considered this to be an important factor at the time.

(4) However, at petitioner's trial Gates identified Eldridge as the man he saw in the lineup at the police station. Petitioner was never in a lineup; the man Gates identified was indeed Price. This fact was never brought out at trial.

(5) Price lived in the same block as petitioner's cousin.

(6) The police report on the November 15 robbery listed the telephone numbers of seven eyewitnesses together with the comment that except for Winston Gates, Steve Wright, and Dorothy Wright "all other persons originally involved couldn't make a decision about the 'subject.'" This notation itself should have alerted defense counsel that

those who could not positively identify Eldridge immediately afterward could provide exculpatory evidence.

(7) There was obvious confusion and inconsistency about the height and complexion of the two robbers that should have moved a prudent attorney to question whether the identification of Eldridge was proper. If counsel had interviewed the prosecution witnesses and investigated the other police reports he would have been alerted to the possibility of mistaken identification.

On the police report the tall, light complected robber was estimated to be 6′0″ or 6′1″. Eldridge is 6′0″. At the trial (by necessity) the dark complected robber became the tall one—allegedly six inches taller than the light complected subject. Price and Eldridge are approximately the same height, but Hosea Simpson, who was Price's accomplice in the November 24 robbery, was about six inches shorter than Price. Eldridge was alleged at trial to be the tall robber who carried a dark colored weapon. Yet, according to the police report the tall robber had a silver-colored weapon. Price did have a silver-colored weapon when he was arrested. In addition, the police report of November 15 should have alerted a reasonable person that the identification was not right. It read:

> The man carrying a chrome pistol was light-skinned, taller, thin, with short hair, and wore a denim jacket. The second man was shorter, darker complected, carried a dark-colored pistol, and wore a dark blue short jacket with green and white checked pants.

Thus at trial, completely inconsistent with the report given to the police immediately following the robbery, it turned out that Eldridge was taller than Price, was dark complected, and owned a dark gun.[3]

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[3]Willie Coburn testified at the 27.26 hearing that Eldridge actually owned a silver-colored gun and that the gun was locked in his house at the time of the robbery.

(8) Neither counsel nor his investigator interviewed the tavern owner, John Wilfert, before the trial. This omission is particularly glaring since three eyewitnesses testified that Eldridge was the robber who went behind the bar and emptied the cash register in a face-to-face confrontation with Wilfert. Yet, when the police brought Eldridge to the tavern Wilfert stated that he "knew" the suspect was *not* one of the robbers. The record strongly suggests that the man the police brought to the bar within forty-five minutes of the robbery was Eldridge. However, at trial there was some confusion whether the police had brought two suspects to the tavern or just Eldridge. If counsel had not been unaware of Wilfert's previous statement that Eldridge was not one of the robbers, he could have made that fact clear to the jury. At the least, sufficient pretrial investigation would have revealed whether Eldridge was the suspect Wilfert was shown right after the robbery. Furthermore, counsel would have realized that Gates and the Wrights had made incorrect identifications. An immediate investigation of their identification would have led to Price. Further, a reasonable attorney would have requested a lineup with Price and Simpson alongside Eldridge. Reliable identification would have been established if the lineup was conducted before the eyewitnesses to the November 15 robbery.

Although this analysis may argumentatively be assessed as hindsight reasoning, the record discloses that all of these investigative leads were present before trial but were never pursued because defense counsel did not interview any of the eyewitnesses to the robbery. Counsel did not investigate because he conclusorily decided that Eldridge was guilty and that further investigation would not do any good.

Thus, defense counsel's preparation and subsequent trial strategy was *based in part upon his own conclusory*

decision that Eldridge and Price were the two robbers. Once he made that conclusion it is easy to see why he failed to investigate further, why he failed to pursue calling Taylor as an alibi witness, and why he made no further effort to call Price as a witness. The testimony of Taylor and Price might have been helpful. Eldridge had a receipt from Taylor's record shop. Taylor could have verified petitioner's presence at the record shop, but he told investigator Woods that although he remembered Eldridge he did not wish to get involved. Price allegedly told Woods that he would take the fifth amendment. Price testified at the federal hearing that no one asked him to testify and if asked he would have appeared. Price's testimony at the federal hearing completely exonerated Eldridge. The magistrate did not credit his testimony, however. We do not dispute the credibility finding here.

The important factor here, however, is that trial counsel made no effort to contact or subpoena either Taylor or Price immediately before or at trial. Taylor had no legal right, as a material witness, to remain silent. When a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify. A lawyer's duty to defend rises to a greater measure of responsibility. A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to persuade the witness to present material evidence. We cannot accept trial counsel's excuse that he *thought* Taylor would not cooperate. Counsel need not attain perfection, but he must exercise reasonable diligence to produce exculpatory evidence.

Much of the same reasoning applies to counsel's failure to interview Price. Price's credibility is not at issue.

What is at issue is whether trial counsel failed to exercise reasonable diligence in failing to interview Price before trial. The justification offered is that Price told the investigator before Eldridge's trial that if he were called to testify he would take the fifth amendment. But Price's circumstances changed after he told Woods he would take the fifth amendment. He later voluntarily testified in the federal habeas hearing.[4] Moreover, Price had a lawyer; yet his lawyer was not approached to see if Price would testify for Eldridge. Eldridge's counsel just *assumed* that Price would not help. Under the circumstances, greater effort was required of counsel than simply accepting his investigator's earlier statement that Price would take the fifth amendment. This is particularly true where the police reports *definitely established Price as one of the November 15 robbers and his accomplice as a much shorter man.* Petitioners present counsel somehow induced Price to "tell all" at the federal hearing. Price indicated he would have given the same testimony at the state trial if he had been called. We need not speculate whether it would have made a difference in the final result. It would appear that Price and Eldridge did not even know one another before this case. It is also undisputed that they had an uncanny resemblance to one another; yet none of the eyewitnesses of the November 15 robbery reported any similarity between the two robbers.

In *McQueen* v. *Swenson,* 498 F.2d 207 (8th Cir. 1974), and *Thomas* v. *Wyrick,* 535 F.2d 407 (8th Cir. 1976), this court examined defense counsel's custom of not interview-

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[4]Price pleaded guilty *before* the federal habeas hearing, but *after* the 27.26 hearing. The state trial judge sustained the state's objection at the 27.26 hearing to petitioner's calling Price. Even though Price had not pleaded guilty, both petitioner's counsel and Price claim he would have testified. The alleged reason the state trial judge refused to allow petitioner to call Price was because Price's counsel was not notified or present. Price's counsel could easily have been contacted.

ing prosecution witnesses. In *McQueen* this court found that this "absurd and dangerous policy" contravened the attorney's essential duty to make an adequate factual investigation and could only be viewed "as an abdication—not an exercise—of his professional judgment." 498 F.2d at 216.

In addition to the critical omission of counsel in not interviewing Steve Wright and Winston Gates, counsel was also ineffective in failing to interview Dorothy Wright. Although Dorothy Wright testified at the federal evidentiary hearing that she is now not certain whether Eldridge was a robber, that testimony is not material; however, it does tend to corroborate the claim that if proper investigation had been conducted before trial many of the inconsistencies would have surfaced. Proper investigation could have alerted counsel to investigate Price and his commission of other robberies. This in turn would have demonstrated strong evidence of mistaken identification. We conclude that trial counsel in this case owed a duty (1) to investigate and interview all eyewitnesses to the robbery, (2) to pursue the substantial defense of mistaken identification, and (3) to solicit the testimony of all witnesses who allegedly possessed material facts and knowledge concerning the defendant's guilt or innocence. Trial counsel did none of these things and petitioner was materially prejudiced by counsel's failure. To say only hindsight judgment is at stake ignores the factual record before us.

We conclude that counsel was ineffective within constitutional standards.[5]

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[5]We are aware of the limited nature of the review provided federal courts by 28 U.S.C. § 2254. We have applied the "presumption of correctness" which is mandated by the statute to the factual determinations made by the Missouri state courts. *Sumner* v. *Mata*, 449 U.S. 539 (1981). Thus, since the state court's finding that Eldridge did *not* tell trial counsel about Coburn is supported by the record, it is presumed

(Continued on next page)

We reverse and vacate the judgment denying his writ. Eldridge has served time in prison; he should be released

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Footnote continued
to be correct. Similarly, the state court's finding that Price told Woods that he would take the fifth amendment protection is entitled to the same presumption.

Section 2254 requires a federal habeas court to presume the correctness of the state court's *factual findings*. As stated by Justice Brennan in *Sumner* v. *Mata*, 449 U.S. at 555:

> The factual issues to which § 2254(d) applies are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . .'" *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 (1980) (quoting *Townsend* v. *Sain*, 372 U.S. 293, 309 n.6 (1963)). Section 2254(d) does not, however, bar a federal court from reviewing "a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case." *Id. see Brewer* v. *Williams*, 430 U.S. 387, 403-404 (1977).

Sumner v. *Mata*, 449 U.S. at 555 (Brennan, J. dissenting).

Whether trial counsel's actions were sufficient to meet the standard of effective assistance is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. *Cuyler* v. *Sullivan*, 446 U.S. at 342; cf. *Brewer* v. *Williams*, 430 U.S. 387; *Neil* v. *Biggers*, 409 U.S. 188, 193 n.3 (1972).

The failure to interview prosecution witnesses is a violation of counsel's constitutional duty to render effective assistance. *Morrow* v. *Parratt*, 574 F.2d 411 (8th Cir. 1978); *Thomas* v. *Wyrick*, 535 F.2d 407, 413 (8th Cir. 1976); *McQueen* v. *Swenson*, 498 F.2d 207, 216 (8th Cir. 1974). *Compare Plant* v. *Wyrick*, 636 F.2d 188 (8th Cir. 1980); *United States* v. *Beran*, 580 F.2d 324 (8th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979) (no demonstration that failure to interview was prejudicial). We have already discussed how counsel's failure to interview these witnesses prevented him from questioning his own belief that Price and Eldridge were guilty of the crime charged.

The state court as well as the federal district court found it was a matter of trial strategy not to call Coburn, Taylor, or Price to the stand. We think the presumption of correctness under section 2254(d) applies to this finding. We also agree that counsel need not call an alibi witness if he reasonably believes that the witness will not help his client. However, counsel has a duty to use witnesses named by a

(Continued on next page)

from all state custody and his conviction set aside. We direct a writ of habeas corpus be issued.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Footnote continued
defendant who may assist in the defense. *Eldridge* v. *State*, 592 S.W.2d 738 (Mo. 1979); *Jones* v. *State*, 491 S.W.2d 233 (Mo. 1973). To fulfill that duty counsel must make a reasonable attempt to investigate a material witness' knowledge. The state court did not inquire into the reasonableness of counsel's trial strategy. Counsel made no reasonable attempt at the time of trial to learn whether Taylor or Price really would refuse to testify to what they knew. His "strategy" not to use them was not so much trial strategy as it was an accommodation to his own inadequate trial preparation. We find as a matter of law that counsel failed to make proper use of witnesses named by the defendant who could have assisted in the defense. Similarly, under the facts and circumstances developed before trial, particularly as they related to the strong descriptive evidence suggesting that Price and Eldridge *did not* act together in the November 15 robbery, defense counsel had a further duty to discuss Eldridge's involvement with Price through his appointed attorney. He made no effort to do this. Thus, although it may have been a trial decision of counsel not to pursue Price's testimony it was counsel's lack of preparation which went a long way in inducing him to make it.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM ELDRIDGE, *Petitioner,* v. CAROLYN ATKINS, et al., *Respondents.*	No. 80-239C(C)

ORDER

On May 14, 1980, the Magistrate filed a review and recommendation that William Eldridge's application for federal habeas corpus be denied. The petitioner made objections to the Magistrate's findings and the Court granted petitioner a hearing.

Petitioner has already served his time on his state court conviction, and now asks to be discharged from the custody of Carolyn Atkins, the administrator for the Missouri State Board of Probation and Parole. His sincerity is intensified by the fact that he is free of prison, but yet wants a new trial. Eldridge's present counsel has made an enthusiastic and vigorous claim that the petitioner had ineffective assistance of counsel during his trial.

Eldridge's principle claim of ineffectiveness is based upon his claim that his trial attorney neglected to interview and call certain witnesses for the defense. The record and the hearing conducted by the Magistrate would indicate

that some of the witnesses in question were contacted by investigators from the public defender's office, although not personally contacted by the trial attorney. The potential witnesses in question gave the trial attorney good and cogent reasons which, in his opinion, would indicate they would not be helpful as witnesses, and the trial counsel ultimately made that determination.

Failure to interview prospective witnesses may well be a breach of the duty to act as a reasonably competent attorney. *Thomas* v. *Wyrick*, 535 F.2d 407 (8th Cir. 1976); *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974); *Morrow* v. *Parratt*, 574 F.2d 411 (8th Cir. 1978).

The record, pleadings contained in this case, the hearing, and the Magistrate's reviews and recommendations would indicate that this is not a failure to contact potential witnesses, but a judgment call as to whether or not to use the witnesses. Trial counsel found good reason to reject all four of the proferred witnesses as effective defense witnesses. These are decisions that have to be made by trial counsel. These decisions are not inconsistent with the conduct with a reasonably competent attorney.

We are impressed that petitioner would like to retry his case, via federal habeas corpus, in the federal district court. Section 2254 and this Court are not vehicles for that process. We do not find that the petitioner has shouldered the burden that is necessary to override the presumption that his trial counsel did exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.

Therefore,

IT IS THE ORDER OF THIS COURT that petitioner's application for habeas corpus be, and is, hereby denied.

APPENDIX C

Prior to the issuance of the order of the District Court's order denying petitioner's petition for a writ of habeas corpus, two opinions were issued on this cause by the Honorable William S. Bahn, United States Magistrate, at the direction of the District Court. The first such opinion, issued on May 4, 1980, reads as follows:

Magistrate's Review and Recommendation

William Eldridge seeks federal habeas corpus via § 2254, from the supervision of Carolyn Atkins, Chairman of the Missouri Division of Probation and Parole. Eldridge was convicted in the Circuit Court of the City of St. Louis on March 7, 1975, and sentenced to three five year sentences to run consecutively for three convictions of robbery in the first degree. These convictions were subsequently remanded by the Missouri Court of Appeals, St. Louis District, for resentencing. This was done on January 7, 1977, when the sentences aforedescribed were reduced to ten years, one of the counts to run concurrent. Subsequently, Eldridge was obviously placed on parole from which he seeks discharge.

In his petition for habeas corpus, his first ground basically alleges ineffective assistance of counsel in four areas, failure to discover three police reports, refusal to call an alibi witness, failure to interview any of the fifteen-twenty eye witnesses to the robbery in question, and refusal to call the co-defendant, Willie Price, as a witness.

Eldridge submitted Ground Two of his claims of ineffective assistance of counsel in that the public defender, his counsel, had a conflict of interest in representing both defendants charged in the holdup.

Eldridge's Ground Three again refers to the three police reports that were mentioned in Ground One.

Eldridge's Ground Four says that his conviction was obtained without due process of law by the court's failure to grant a mistrial.

Respondent's memorandum to the show cause order admits supervision of the petitioner by Respondent Atkins and requests dismissal of Ground Two, that of counsel's conflict of interest, because of failure to exhaust. We note that the claim of conflict of interest and denial of due process were not submitted on appeal, which was transferred from the Missouri Court of Appeals at St. Louis, to the Supreme Court of Missouri to apply appropriate standards to the charge of ineffective assistance of counsel. However, we will consider the petition *en toto* to ascertain whether or not correct federal standards were applied to petitioner's claims. *Fay* v. *Noia*, 372 U.S. 391 (1963).

The opinion of the Missouri Supreme Court, No. 61320 dated December 6, 1979, succinctly sets out the facts surrounding the particular crime:

> About 6:30 on the evening of November 15, 1974, two men robbed John's Tavern in St. Louis and some of its patrons of an undetermined amount of cash and went outside. After a minute or two, they returned, locked everyone in the bathrooms and fled. Shortly thereafter, the police were called and two of the victims, Steve Wright and Winston Gates told police officers they recognized one of the robbers and knew where he lived. They accompanied the officers on a patrol of the neighborhood and, about 7 p.m. when William Eldridge was seen leaving his house, both witnesses identified him as one of the robbers. He was arrested and searched; a chrome-plated ammunition clip and seventeen live .32 caliber

bullets were found in his pocket. He was taken to the tavern where he was identified by some of the other patrons. Witnesses to the robbery previously had told police that one of the robbers had worn green and white checked pants with a defective cuff; Eldridge was wearing such pants.

The Missouri Supreme Court appropriately and accurately cited the tests devised to assess effective assistance of counsel. Movant, to prove ineffective assistance of counsel, must show: (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, and (2) that he was prejudiced thereby. *Thomas* v. *Wyrick*, 535 F.2d 407 (8th Cir. 1976); *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974).

Defense counsel had good cause not to call the three witnesses that petitioner claimed should have been called. Witnesses Taylor and Price indicated they would not cooperate and would take the Fifth Amendment on the stand. Coburn would have testified about a weapon that would have connected petitioner with a pistol that fit the description of the pistol used in the robbery. Wisely, counsel decided against this strategy. A simple assertion against defense counsel's choice of trial strategy in calling or not calling witnesses is certainly not positive establishment of ineffective assistance of counsel. Counsel gave good cogent reasons at the 27.26 hearing, as to his reasons for not calling subject witnesses (Respondent's Exhibit C).

Concerning the conflict of interest charge, the records would indicate that one public defender represented the petitioner at trial and another public defender did represent the co-defendant, Willie Price, during a pretrial line-up, and only for the purpose of the line-up. Petitioner fails to show any possible area in which this

representation affected the outcome of his case. This is part of the burden he assumes in the *Thomas-McQueen* test. The Supreme Court of Missouri reached the police report issue by noting that petitioner's counsel, believing that his client and Price might have committed the crime together, would not want to show additional police reports implicating his client's accomplice in other crimes. This is obviously trial court strategy, which although subject to critical hindsight, does not establish a basis for finding defendant to have been denied a fair trial. *Reynolds* v. *Mabry*, 574 F.2d 978 (8th Cir. 1978).

Concerning petitioner's last allegation, that of being denied due process because of the trial court's failure to declare a mistrial, because one of the holdup victims testified that other victims not testifying at petitioner's trial also identified petitioner, we find to be within the purview of state court procedures, not normally disturbed by federal courts. *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Atwell* v. *Arkansas*, 426 F.2d 912 (8th Cir. 1970).

Therefore, it is the recommendation of the reviewing Magistrate that William Eldridge's application for federal habeas be dismissed without further proceeding. It is the further observation of the reviewing Magistrate that the Missouri Courts have correctly applied the federal standards for assessing ineffective assistance of counsel claims and have come to accurate conclusions in denying Eldridge's petitions there. The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. § 636(b).

The second opinion of Magistrate Bahn, dated September 30, 1980, reads as follows:

Magistrate's Review and Recommendation

This cause was originally before this Court for consideration of petitioner's petition pursuant to 28 U.S.C. § 2254. This Court made a review and recommendation to which petitioner made objections. This Court then granted petitioner a hearing. Said hearing was conducted and a transcript made which is contained in the court file.

Petitioner's sole issue at the hearing was that he was the subject of ineffective assistance of counsel at his trial. He says this requires the issuance of a writ of habeas corpus. In particular, petitioner has argued that his court-appointed public defender failed to interview various alibi witnesses and prosecution witnesses. Additionally, plaintiff's attorney reargued his Ground No. 2, which concerned a conflict of interest issue, growing out of the public defender's office representing both defendants charged in the same holdup. This latter issue has been thoroughly covered in our original review and recommendation, which we adopt by reference, and will not be reconsidered here.

Petitioner's counsel argues that defense counsel's principle acts of ineffectiveness were his failure to personally interview certain witnesses, to wit: Edgar Taylor, Willie Price, Willie Coburn and some prosecution eye witnesses. The evidence concerning Taylor shows that petitioner's trial counsel had an investigator contact Mr. Taylor concerning testifying at petitioner's trial. This investigator reported that the witness "did remember, [but] he didn't want to testify" (Respondent's Exhibit C, p. 99). The attorney went on to testify that he did not want to use an unwilling witness because said witnesses could hurt their case.

As to Willie Price, petitioner's trial attorney stated that he did send his investigator to talk with Willie Price. The investigator reported that Willie Price would take the Fifth Amendment if put on the stand. Willie Price was called as a witness in the hearing conducted by this Court. Price stated that no one representing the petitioner contacted him, including Mr. Woods. He stated he would probably testify that petitioner was not involved in the robbery for which he was convicted.

Concerning Willie Coburn, petitioner's trial attorney had testified that he talked to Willie Coburn during trial, but never about being a witness. Further, he would not have called Willie Coburn because his testimony would have only proven that the petitioner had access to a gun, which would have been harmful to his case.

As stated before, this Court is of the opinion that defense counsel had good cause not to call the three witnesses that petitioner now alleges should have been called to testify. Taylor was an unwilling witness. Price indicated he would employ the Fifth Amendment. Price's current testimony that he was not contacted by anyone on petitioner's behalf and would have come forward to testify if contacted, is highly suspect. On at least two occasions in his direct testimony, petitioner conditioned his readiness to testify with the words, ". . . would probably have come forward" (Tr. 27). On cross-examination, various inconsistencies, between Price's testimony now and at his guilty plea, were pointed out concerning the robbery. Additionally, as Price indicated, he was attempting to escape the burglary charges against him at that time. Any testimony exculpating petitioner and implicating himself and others would certainly have been detrimental to his case at that time. The fact that he later changed his mind and now states he would testify in petitioner's behalf, is unpersua-

sive. It is not uncommon for prisoners to change their testimony once convicted.

The testimony of Willie Coburn, the last witness petitioner wished called, would have only connected petitioner with the ownership of a gun. Defense counsel testified he knew of Coburn and talked to him during the trial, but not about being a witness. He stated that the only thing using Coburn for would prove that petitioner had access to a gun, which would be detrimental to his case. Once again, we find this would have been a wise strategy. Eldridge's present attorney has made a vigorous presentation of his pleas. In substance, he has attempted to retry Eldridge's state case in the Federal Court. This is not the function of the District Court.

Throughout these proceedings, petitioner's counsel has strongly argued that defense counsel was responsible for personally interviewing these witnesses. The facts are indeed clear that defense counsel did not do same. Instead, as a public defender, he was assigned an investigator, who he used to investigate and initially contact witnesses. As defense counsel had testified, if these witnesses had indicated a willingness to cooperate and their testimony would be beneficial, he would have personally contacted them. Such a procedure, we find to be totally compatible with that of a reasonably competent attorney. We are of the opinion that the requirements of *McQueen* v. *Swenson*, 498 F.2d 207 (8th Cir. 1974), and *Thomas* v. *Wyrick*, 535 F.2d 407 (8th Cir. 1976), are satisfied.

In conclusion, it is the recommendation of the undersigned United States that the petitioner's petition for habeas corpus should be dismissed.

The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. § 636(b).

Opposition

RECEIVED
MAR 3 1982
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

CAROLYN ATKINS, et al., Petitioners,	)	
vs.	)	Cause No. 81-1516
WILLIAM ELDRIDGE, Respondent.	)	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now respondent by and through counsel, George D. Johnson, and for his Motion states:

1. That he is the responding party in the above-entitled cause in which he sought, and was granted, a writ of habeas corpus by the Eighth Circuit Court of Appeals.

2. That counsel herein was appointed by the Eighth Circuit Court of Appeals pursuant to the Criminal Justice Act of 1964, as amended, pursuant to its determination that respondent was an indigent.

WHEREFORE, respondent prays that he be permitted to respond to this cause as an indigent, pursuant to Supreme Court Rule 46.

George D. Johnson
7711 Carondelet, Suite 401
St. Louis, Missouri 63105
(314) 862-3535

Attorney for Respondent

CERTIFICATE OF SERVICE

I, George D. Johnson, a member of the Bar of this Court, hereby certify that one copy of the Motion For Leave To Proceed in Forma Pauperis in the case of Atkins, et al. v. Eldridge (Supreme Court Case No. 81-1516) was mailed by first class mail, postage prepaid, this 2nd day of March, 1982, to the attorney of record for both petitioners, to-wit: John M. Morris, III. Said brief was addressed as follows:

Mr. John M. Morris, III
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102

George D. Johnson

Subscribed and sworn to before me this 2nd day of March, 1982.

Mary Catherine Wilson
Notary Public

My commission expires:
9-7-85

No. 81-1516

RECEIVED
MAR 3 1982
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CAROLYN ATKINS,
Chairman, Missouri Board of Probation and Parole,
JOHN ASHCROFT,
Attorney General of Missouri,
Petitioners,

v.

WILLIAM ELDRIDGE,
Respondent.

On Petition From The United States Court
Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

George D. Johnson
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Attorney for Respondent

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QUESTIONS PRESENTED

I.

WHETHER UNDER THE FACTS IN THIS CASE THE EIGHTH CIRCUIT DEPARTED FROM PRIOR CASELAW IN HOLDING THAT RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL DID NOT INTERVIEW PROSECUTION WITNESSES OR ALIBI WITNESSES.

II.

WHETHER PETITIONERS' EXHAUSTION ISSUE IS WELL-TAKEN OR AFFORDS ANY BASIS FOR OVERTURNING THE DECISION BELOW.

III.

WHETHER THE STANDARDS FOR DETERMINING EFFECTIVENESS OF COUNSEL ARE SO IMPRECISE AS TO REQUIRE REVIEW BY THIS COURT.

IV.

ASSUMING THE STANDARDS FOR DETERMINING EFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE REVIEWED, WHETHER THE INSTANT CASE OFFERS AN APPROPRIATE OPPORTUNITY TO REVIEW THOSE STANDARDS.

STATEMENT OF THE CASE

This case arises out of the 1975 armed robbery convictions of respondent William Eldridge, and the December 3, 1981 Order of the Eighth Circuit Court of Appeals vacating those convictions. Prior to the convictions in this case, respondent had no criminal record.

In November of 1974, William Eldridge, respondent herein, was living in Los Angeles, California. He had come to the Midwest to visit several family members and had been in St. Louis about one week prior to his arrest on November 15th. That afternoon, he had returned to the home of his cousin, Constance McDonald. (Resp. Ex. G-259-61). He had spend the previous several days with another cousin, Willie Coburn. Coburn found out that respondent had a chrome colored pistol, which he persuaded respondent to leave at Coburn's house. (Resp. Ex. G-278). Respondent arrived at McDonald's house at 2:30, and visited with family members. At about 6:00 p.m., he went to a neighborhood record shop, bought two records, and came home. (Resp. Ex. G-263). He got dressed to go out for the evening and was leaving the house when he was stopped by the Police. He was identified by two victims of a robbery as one of the men who had just held them up. (Resp. Ex. G-82). He was arrested and searched, and a clip and some bullets from his pistol were found in his overcoat pocket. (Pol. Rpt. Ex. P-3,4). He was taken back to John's Tavern, where the robbery occurred, and the wife of one of the identifying witnesses also identified respondent. (Resp. Ex. G-122). The police report noted that no one else "could make a decision about the subject" (Pol. Rpt. Ex.P-3,5), including the tavern owner, who according to the identifying witnesses, had just dealt with respondent in a face-to-face confrontation at the cash register. (Resp. Ex G-58).

Although respondent had some savings, it was insufficient to retain counsel beyond his arraignment, so a public defender was appointed to represent him. (Resp. Ex. G-266). He told his attorney he did not rob anyone, and gave him the names of several alibi witnesses. (Resp. Ex. G-26, 32, 91, 100). The lawyer's

investigator reported back that they corroborated his client's alibi. (Resp. Ex. C-91, 99). The lawyer nevertheless "decided" not to use them because he "heard" from the investigator that they would rather not testify. No attempt was ever made to contact them after that. Nor were they subpoenaed at trial, although his client specifically asked him to do so. (Resp. Ex. C-30, 33).

At the trial the jury heard the three positive eyewitnesses testify that petitioner was the tall (6'0") dark-skinned robber with the dark colored gun. They stated that the green and white plaid or checked trousers respondent was wearing when arrested matched those worn by one of the robbers. His coat did not, but the pants and a chrome ammunition clip and some bullets in his coat pocket were placed in evidence. (Resp. Ex. G-168, 70).

The defense offered respondent and several family members who testified that except for the time he went to the record shop, respondent was at his cousin's home when the robbery occurred.

The defense attorney's attempt to impeach the state's witnesses consisted basically of trying to show that the light was too poor to make a reliable identification, and that the witnesses had been drinking. (Resp. Ex. G-100, 122-24).

Respondent was convicted as charged--three counts of armed robbery.

After he appealed and lost, he filed his State Postconviction Motion, at which time this writer was appointed to represent him. In preparing for the postconviction hearing, counsel found that the trial attorney not only did not follow up on the corroborating alibi witnesses, he failed to discover three police reports, failed to interview any of the witnesses listed on the report he had, and failed to use the information on it when cross-examining the prosecution witnesses on numerous inconsistencies in their testimony. That evidence, and the uses that a reasonably competent attorney should have made of it, are set forth in detail in the Eighth Circuit's Opinion (App. A, 3-17). The evidence amply demonstrated that petitioner was mistakenly identified as

the taller robber, later shown to be Willie Price; that respondent and Price not only were approximately the same height and weight, they looked almost identical; that Price lived a block from respondent's cousin's house; that Price was arrested in a similar incident a few days later with a juvenile who matched the description of the second robber (who according to the prosecution witnesses was six inches shorter than respondent or Price); that the same witnesses who identified respondent also identified Price at a lineup arising out of the same robbery. (Pet. Ex. P1). That same witness also identified Price as the man who robbed the same tavern the week before. (Pet. Ex. P1). Yet he testified without challenge that he had identified respondent at the police station and that he had never seen either robber before November 15th. (Resp. Ex. G-15). Also, contrary to petitioner's contention that the attorney had no reason to know about the information on Price's police reports, it should be noted that the same Public Defender's office that represented respondent also represented Price at Price's lineup. (Pet. Ex. P-2,5).

Every one of the foregoing facts was presented to each of the Missouri state courts in an effort to get respondent's convictions set aside, which they consistently refused to so.

It should also be noted that respondent also offered the testimony of Willie Price at the state postconviction hearing to show that the two men not only were the same size and height, but that they remarkably resembled each other (which the state admitted).[1] Furthermore, Price would have testified that he was the robber, not respondent, and would have named his accomplice! (Resp. Ex. G-109). The Court refused to let Price testify, or even come into the courtroom. (Resp. Ex. G-108, 09). But within eight weeks, Price pleaded guilty to the same robbery.

When respondent asked the appellate courts to consider this fact on appeal, they refused. Respondent then filed a Petition

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[1]The resemblence between Price and Eldridge was never in dispute. The attorney admitted knowing about it before the trial. (Resp. Ex. C-91) and the state so stipulated at the postconviction hearing. (Resp. Ex. C-102).

for Writ of Habeas Corpus directly in the Missouri Supreme Court, which also was denied. Although respondent cited the Eighth Circuit's holdings in McQueen v. Swenson, 498 F.2d, 207 and Thomas v. Wyrick, 535 F.2d 407, to show that he was denied the effective assistance of counsel as a matter of law, the Missouri Courts denied relief, just as they had to McQueen and Thomas.

After the Missouri Supreme Court denied relief and after it refused to rehear the case, respondent filed suit in the U.S. District Court for the Eastern District of Missouri, under 28 U.S.C. § 2254.

At the federal hearing Price did appear. When he stood next to respondent, petitioner's counsel stipulated that they were approximately the same height. (Mag. Tr. 22). Price testified in detail about the robbery attempt and a hot-pursuit chase on November 24, 1974. Simpson's mugshot was identified and placed in evidence. It showed one remarkable similarity between Simpson and respondent--their chins. The uncanny resemblance between respondent and Price is not at issue. But insofar as it refutes petitioner's allegations that the evidence was somehow insufficient to support the decision below, it should be noted that when one of the prosecution witnesses heard the foregoing evidence at the federal hearing, and saw Price and respondent together, she recanted. (Mag. Tr. 55).

Although petitioner's counsel did not specifically admit that one of the grounds upon which the Eighth Circuit's opinion is based was an exhausted issue, he did specifically admit it in his Response to Order to Show Cause, at page 3:

> [Petitioners herein]do not dispute that [respondent herein] has exhausted state remedies with regard to the essence of his first claim: that he suffered the ineffective assistance of counsel because his attorney refused to call three potential alibi witnesses and failed to discover several police reports.

Petitioner's counsel is furthermore incorrect when he states that "the alleged failure to interview eyewitnesses was not raised in respondent's Missouri Supreme Court brief (Respondent's Exhibit D)--" App. Brief, pp. 14 n.8. It was raised in respondent's Exhibit D--on pages 3, 4, 12 and 22.

ARGUMENT

I.

WHETHER UNDER THE FACTS IN THIS CASE THE EIGHTH CIRCUIT DEPARTED FROM PRIOR CASELAW IN HOLDING THAT RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL DID NOT INTERVIEW PROSECUTION WITNESSES OR ALIBI WITNESSES.

Counsel for petitioners has substantially misstated the facts in his Petition for Certiorari. For instance, there was no mention that alibi witness Edgar Taylor told the public defender's investigator that he did remember William Eldridge, i.e., he corroborated Eldridge's alibi (Eldridge v. Atkins, 655 F.2d 228, 231 8th Cir. 1981; petitioner's appendix A-5). And, although arguing in his petition that the attorney had no reason to inquire further that his client had been mistaken for codefendant Willie Price (petition, p. 7-8), he neglected to mention that the attorney admitted in the state postconviction hearing that his investigator told him that Price and Eldridge did look alike. Nevertheless, he failed to do any further follow-up although he new that was "an identification case" (Tr. C-96). Nor was it mentioned that the same public defender's office represented Price in a lineup (Tr. C-96).

Despite a vigorous argument supporting his contention that some eyewitnesses may have been interviewed, the defense attorney's admissions were more than adequate to support a finding that they were not (Tr. C-96). He admitted interviewing none of the victims of the robbery listed on the report he had (Tr. C-96).

Many of the weaknesses in the State's case that Mr. Eldridge's attorney never challenged are set out in some detail in the Eighth Circuit's Opinion (petitioner's appendix 1, A-6 through A-17). For purposes of responding to the petition herein it should suffice to point out that the recitation of facts upon which petitioners rely barely resembles the undisputed record, and that the defense attorney did not interview prosecution witnesses or alibi witnesses. The few factual disputes, such as the weight to be given Willie Price's testimony, or whether the attorney was given the names of two alibi

witnesses or three[2], were all resolved against respondent, and those findings were consistently followed by the Eighth Circuit. So petitioner's great reliance on findings of fact is not well taken.

But even if it had been well taken, counsel addresses a false issue, for it is not the findings of fact that would ordinarily be significant to this Court, it is the application of federal law to those facts in a manner consistent with prior holdings--i.e., whether the mixed determination of law and fact amounted to a significant departure from prior cases.

The Court in the instant case merely applied well-settled principles to the well-established facts:

a) Defense counsel has a duty to interview prosecution witnesses and failure to do so is ineffective assistance of counsel. McQueen v. Swenson, 498 F.2d 207, (8th Cir. 1974); Thomas v. Wyrick, 535 F. 2d 407 (8th Cir. 1976).

b) Defense counsel must also use reasonable diligence to call alibi witnesses, and failure to do so is also ineffective assistance of counsel. Thomas, supra.

If anything, this case is stronger factually than its precedents. If this is a "departure" as petitioners contend, then it is hardly to their advantage to raise it.

II.

WHETHER PETITIONER'S EXHAUSTION ISSUE IS WELL-TAKEN OR AFFORDS ANY BASIS FOR OVERTURNING THE DECISION BELOW.

The exhaustion question is also without merit. First, it was thoroughly addressed below (Resp. Ex. D-3, 12, 18 and 22; DR-34,36; 8th Cir. Reply brief, pp. 14-18). Although the foregoing citations show the issue was thoroughly argued below, for purposes of this response, it should be noted that every fact upon which the Eighth Circuit based its decision was presented

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[2]A dispute arose as to whether the attorney had been told about the testimony of a third abibi witness, Willie Coburn. The State Court found against respondent on that issue, which finding was not disturbed on review by the Eighth Circuit.

in the state postconviction hearing, each stage of the appeals, and in the separate habeas corpus petition to the State Supreme Court.

But even if they had not been, it is undisputed that the failure to call alibi witnesses Taylor and Price was an exhausted question, and it alone is sufficient to support the Eighth Circuit's decision. Thomas v. Wyrick, supra, at 410, 415-16.

III.

WHETHER THE STANDARDS FOR DETERMINING EFFECTIVENESS OF COUNSEL ARE SO IMPRECISE AS TO REQUIRE REVIEW BY THIS COURT.

Since this Court held in Powell v. Alabama, 287 U.S. 45 (1932) that the Fourteenth Amendment right to counsel included the right to effective counsel, there has been no shortage of cases defining the parameters of effectiveness. Most have come from the lower Courts. Of particular interest in this case, however, is White v. Ragen, 324 U.S. 760 (1945), reh. den. 326 U.S. 807, in which this Court held that when counsel did not confer with his client and refused to call a witness as requested, petitioner stated a prima facie case that counsel was constitutionally ineffective. White, supra, 764.

Although the wording of the standard varies somewhat between the Circuits, the term "mockery of justice" is most widely used in the First [U.S. v. Ritch (C.A. 1 Puerto Rico), 583 F.2d 1179, cert den. 439 U.S. 970], Second [U.S. v. Taylor (C.A. 2d NY), 562 F.2d 1345, cert. den. 432 U.S. 909], Fourth [Marzullo v. Maryland (C.A. 4th Md), 561 F.2d 540, cert. den. 435 U.S. 1011], Eighth [McQueen and Thomas, supra], Ninth [U.S. v. Martin (C.A. 9th Ariz), 489 F.2d 674, cert den. 417 U.S. 948], and Tenth [Lorraine v. U.S. (C.A. 10th Utah), 444 F.2d 1] Circuits.

A number of courts in the foregoing circuits have applied pragmatic guidelines in determining whether the traditional standard has been met. Examples appear in cases in the Fourth Circuit [Coles v. Peyton (C.A. 4th Va) 389 F.2d 224 cert. den. 393 U.S. 849], Ninth Circuit (U.S. v. Miramon (C.A. 9th Calif) 470

F.2d 1362, cert. den. 411 U.S. 934] and in the Eighth Circuit cases of McQueen and Thomas, supra. Coles sets out specific guidelines re: counsel's obligation to confer, advise and prepare his client's defense and held that failure to do so was ineffective assistance. Miramon defined the standard in terms of what a "reasonably competent" attorney would do acting as a "diligent, conscientious advocate." McQueen and Thomas likewise articulated that the standard in terms of "a heavy burden" of petitioners to show unfairness.

The remaining Circuits have specifically abandoned the "mockery of justice" language in lieu of a more pragmatic term. The Third Circuit test is one of "normal competence" [Moore v. U.S. (C.A. 3rd PA) 432 F.2d 730]. The Fifth and Sixth Circuits use the phrase "reasonably likely to render and rendering reasonably effective assistance" [Herring v. Estelle (C.A. 5th Tex) 491 F.2d 125; Beasley v. U.S. (C.A. 6th Mich), 491 F.2d 687]. The Seventh Circuit test is one of a "minimum standard professional representation" [U.S. ex rel. Williams v. Twomey, (C.A. 7th Ill), 510 F.2d 634]. The District of Columbia also relies on specific guidelines, particularly those of the American Bar Association's Project on Standards for Criminal Justice, Relating to the Defense Function (Approved Draft 1971) [U.S. v. DeCoster (D.C. App.) 487 F.2d 1197].

Any differences in the standards appear to be in semantics rather than substance. Some courts even apply other circuit's standards in determining that no practical difference exists. (See U.S. v. Jones (C.A. 9th Calif), 512 F.2d 347 which applied the District of Columbia's standard in DeCoster, supra; and in McQueen, 498 F.2d 207, 215, in which the Eighth Circuit found counsel ineffective by any standard, old or new).

The only noteworthy distinction appears to be that some Circuits require the petitioner to show proof of prejudice, while some presume it. That could hardly be the basis for review in the instant case because the Eighth Circuit requires such proof, and because the proof of prejudice in this case was very strong--so much so that when one of the prosecution witnesses was confronted with the evidence in the federal hearing, she recanted (Tr. C-55). Even if the federal judicial circuits have used "differing and somewhat inconsistent" standards as appellants have alleged (App. 12), review by any "other" standard could hardly benefit them in this case.

IV.

ASSUMING THE STANDARDS FOR DETERMINING EFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE REVIEWED, WHETHER THE INSTANT CASE OFFERS AN APPROPRIATE OPPORTUNITY TO REVIEW THOSE STANDARDS.

In overturning respondent's convictions in this case the Eighth Circuit has followed the previous well-established line of cases which require defense counsel to present reasonably discoverable evidence at trial (See Thomas and McQueen, supra). Counsel for respondent could find no prior case in which more evidence went undiscovered or unutilized. Furthermore, it seems highly unlikely that there could be some future case on all fours with it factually.

Reduced to its fundamental applications, the Eighth Circuit merely held that an attorney may not simply ignore alibi witnesses whom the attorney knows can corroborate his client's alibi,when his client specifically asks him to call them as witnesses, and when the client, because of indigency, lacks the ability to obtain other counsel. This finding is consistent with Powell, all subsequent

cases, ABA standards[3], and any standard of civilized justice.

Although this is an interesting case on its face (perhaps even a worst-case example of the horrors that can be caused by inadequate trial preparation), it simply has no value as precedent. The facts in Eldridge are so outrageous that they could hardly be squared with those in any other case. Eldridge merely reaffirms the right of defendants to one of our most traditional and fundamental rights; to have counsel who will prepare and present their case properly, when measured by the least demanding standard of all: the "mockery of justice" test. With a standard so minimal, and a violation so gross, it seems absurd for petitioners to contend that this case somehow disturbs precedent, makes new precedent, or is in any way worthy of this Court's time and attention.

CONCLUSION

For each of the foregoing reasons, respondent respectfully suggests that the Petition for a Writ of Certiorari submitted in this cause should be denied.

Respectfully submitted,

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Attorney of record for Respondent

[3] American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and the Defense Functions § 4.1 (Approved Draft 1971).

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CERTIFICATE OF SERVICE

I, George D. Johnson, a member of the Bar of this Court, hereby certify that one copy of the Brief in Opposition to Petition for a Writ of Certiorari in the case of Atkins, et al. v. Eldridge (Supreme Court Cause No. 81-1516) was mailed by first class mail, postage prepaid, this 2d day of March, 1982, to the attorney of record for both petitioners, to-wit: John M. Morris, III. Said brief was addressed as follows:

Mr. John M. Morris, III
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102

George D. Johnson

Subscribed and sworn to before me this 2nd day of March, 1982.

Mary Catherine McGraw
Notary Public

My commission expires:

9-7-85